FILE COPY.

In the Supreme Court of the United States.

OCTOBER TERM, 1925.

ORIGINAL. No. 12.

THE STATE OF WISCONSIN, COMPLAINANT,
v.
ETHAN ALLEN HITCHCOCK, AS SECRETARY of the Interior, defendant.

In Equity

BRIEF AND ARGUMENT FOR DEFENDANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

ORIGINAL NO. 12.

THE STATE OF WISCONSIN, COMPLAINANT,
v.
ETHAN ALLEN HITCHCOCK, AS SECRETARY of the Interior, defendant.
} In Equity.

STATEMENT.

This proceeding seems to be authorized by the act of Congress of March 2, 1901 (31 Stat., 950), (*Minnesota* v. *Hitchcock*, 185 U. S., 373), and the act of the Wisconsin legislature, approved April 20, 1903. (Second amended bill, Subdv. XIX, p. 22.)

By its second amended bill of complaint, the State of Wisconsin claims that by virtue of the school land grant contained in section 7 of the enabling act of August 6, 1846 (9 Stat., 56, 58), which was subsequently accepted by the constitutional convention called in pursuance of such act and ratified by an article in the constitution submitted by it (which constitution was adopted by a vote of the people of Wisconsin March 2, 1848), said State claims the absolute

fee title to and complete dominion over all of the lands embraced in section 16 in each township within the present limits of the La Pointe or Bad River Indian Reservation and the Lac Du Flambeau Indian Reservation in said State, being sections 16 in Ts. 46 and 47 N., Rs. 2 and 3 W., T. 47 N., R. 1 W., T. 48 N., R. 3 W., T. 40 N., R. 5 E., and T. 41 N., Rs. 4 and 5 E., and prays that the defendant, as Secretary of the Interior, be restrained and enjoined from interfering in any manner with the possession, use, or enjoyment of the lands within said sections, or any part thereof, by the State or its grantees, or from interfering with the exercise of acts of ownership by the State or its grantees in respect to said lands.

The defendant has filed a demurrer to the second amended bill of complaint which, in effect, denies that the complainant is entitled to the relief demanded or to any relief, and challenges the jurisdiction of the court in regard to the subject-matter of the action.

The allegations set forth in said bill, in so far as the same are pertinent to the questions raised by the demurrer in effect, are as follows:

1. That the Wisconsin enabling act was passed August 6, 1846 (9 Stat., 56, 57, 58), and the act of admission May 29, 1848 (9 Stat., 233, 234, 235).

2. That that part of section 7 of the enabling act which provides for the grant of lands to said State reads as follows:

> That section numbered sixteen in every township of the public lands in said State, and where such section has been sold or otherwise

disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to said State for the use of schools.

3. That prior to March 28, 1843, all the land included within the above-mentioned Indian reservations was unceded Indian land and occupied by various branches of the tribe of Chippewa Indians and by the tribes of Menominee and Winnebago Indians. (Second amended bill, Subdv. IV, pp. 4, 5, 6, and 7.)

4. That by Article I of the treaty of March 28, 1843 (7 Stat., 591), made and concluded between the Chippewa tribe of Indians and the United States, the former ceded to the latter all the lands embraced within the above-mentioned Indian reservations. (Second amended bill, Subdv. IV, pp. 4–5.)

5. That by the first article of the treaty made and concluded September 30, 1854, and proclaimed January 29, 1855 (10 Stat., 1109), between the United States and the Chippewa tribe of Indians, the latter "ceded to the former a large tract of land, therein described, lying within the present boundaries of the State of Minnesota." (Second amended bill Subdv. VIII, pp. 9–16.) That by article 2 of said treaty the United States agreed to set apart and withhold from sale for the use of the La Pointe band of Chippewa Indians and such other Indians as may see fit to settle with them, a part of the lands ceded by the terms of the said treaty of March 28, 1843, and to set apart and withhold from sale for the use of the Wisconsin band of Chippewa Indians, another part of the land so ceded. The lands so reserved for the La Pointe band

was definitely described, while the land so reserved for the Wisconsin band was referred to as "a tract of land lying about Lac Du Flambeau and another tract on Lac Court Orielles, each equal in extent to three townships, the boundaries of which shall be hereafter agreed upon or fixed under the direction of the President." (Second amended bill, Subdv. VIII, pp. 10–11.)

6. That in and by the treaty of 1854 (art. 3), it was agreed that each member of the Chippewa tribe who was the "head of a family or single person over twenty-one years of age," should be entitled to "eighty acres of land for his or their separate use." (Second amended bill, p. 12.) And by article 11 it was agreed that—

> the Indians shall not be required to remove from the homes hereby set apart for them. And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President. (Second amended bill, p. 15.)

7. That the tract of land agreed to be set apart and withheld from sale for the La Pointe band of Indians by article 2 of the last named treaty and known as the La Pointe or Bad River Reservation, included, among other things, all of said Ts. 46 and 47 N., Rs. 2 and 3 W., parts of T. 48 N., R. 3 W., including the section 16 therein in controversy and part of 47 N., R. 1 W., including the section 16 therein in controversy. (Second amended bill, Subdv. X, pp. 16–17.)

8. That the tracts of land agreed to be set apart and withheld from sale for the Wisconsin band of

Indians by the provisions of article 2 of the last-mentioned treaty, known as the Flambeau Indian Reservation, were designated and described by order of the Secretary of the Interior dated June 28, 1866, and embraced, among other lands, part of said T. 41 N., R. 4 E., including the section number 16 of said township; all of said T. 40 N., R. 5 E., and all of said T. 41 N., R. 5 E. and that no further action has been taken by the United States with regard to said reservation, and the same has been held and claimed by the Wisconsin band of Chippewa Indians since the making of the aforesaid treaty of 1854. (Amended bill, Subdv. XI, pp. 17–18.)

9. That the townships named and described were designated and sectionized by the United States pubilc survey as follows:

> In the year 1847 the east line of township numbered 46 north, of range 2 west, and the west line of township number 47 north, range 1 west, were duly surveyed by the United States; that in the year 1852 all of the township lines of town 47 north, ranges 2 and 3 west, and the south and west lines of town 48, ranges 2 and 3, and the south, west, and north lines of township 48 north, ranges 2 and 3 west, were duly surveyed by the United States, and the sectional subdivisions of each of said townships were duly surveyed at various times thereafter in the years 1856, 1858, and 1873.
>
> In July, 1857, the north line of townships 40 and 41, 4 and 5 east; in September, 1860, the east line of said towns 40 and 41, 4 east; and in September, 1861, the south, east, and west

lines of towns 40 and 41, 5 east; and in August, 1864, the south and west lines of townships 40 and 41, 4 east; and in July, 1865, each of said townships was subdivided by such surveys into sections. (Second amended bill, Subdv. X and XI, pp. 16–17.)

10. That the State of Wisconsin has parted with all its interest, if any it had, in sections 16 in controversy, located within the La Pointe Indian Reservation. (Second amended bill, Subdv. XV, p. 20.)

11. That under the treaty of 1854 aforesaid and in carrying out its provisions the defendant as Secretary of the Interior has proceeded through the Indian Bureau to allot from time to time to the various members of said tribes of La Pointe bands of Indians and to various members of the Wisconsin bands on said Lac Du Flambeau Reservation 80 acres per capita of lands within said reservations, and has caused patents therefor to be issued to the members of said tribes as individuals, and such members have become full citizens of the United States and have terminated their tribal relations, and have ceased to occupy any material part of said reservations in common. (Second amended bill, Subdv. XVI, p. 21.)

12. That the lands within said reservation, exclusive of the lands in sections 16, are sufficient to secure 80 acres to each individual Indian who has hitherto appeared and claimed a right to an allotment. That no allotment has hitherto been allowed to any member of said tribes of Indians of any land embraced within any of said sections. (Ib.)

13. That the defendant, as Secretary of the Interior, insists that the La Pointe and other bands of Chippewa tribe of Indians or members thereof have a claim or interest in or a title to said sections 16, and in their behalf has forbidden anyone to enter and make improvements or cut timber thereon, and has interfered with and is "continuing to interfere with the use and enjoyment of the same" by the State and its grantees. (Second amended bill, Subdv. XVIII, pp. 21–22.)

In addition to the allegations set forth in the second amended bill, some of the provisions of the act of February 8, 1887 (24 Stat., 388), and the act of February 11, 1901 (31 Stat., 766), are pertinent. Section 1 of the first-named act reads in part as follows:

> That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or Executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:
>
> To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years of age now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section.

Section 6 of said act provides in part as follows:

> And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the the right of any such Indian to tribal or other property.

Omitting the enacting clause, the act of February 11, 1901, reads as follows:

> That with the consent of the Chippewa Indians of Lake Superior, located on the Bad River Reservation, in the State of Wisconsin,

to be obtained in such manner as the Secretary of the Interior may direct, the President may allot to each Indian now living and residing on said reservation and entitled to so reside, and who has not heretofore received an allotment not exceeding eighty acres of land, such allotments to be subject in all respects, except as to the age and condition of the allottee, to the provisions of the third article of the treaty with the Chippewas of Lake Superior and the Mississippi, concluded September thirtieth, eighteen hundred and fity-four.

POINTS AND AUTHORITIES.

A.

Effect of the Demurrer.

The demurrer admits only such allegations in the bill as are well and sufficiently pleaded. It does not admit those allegations which amount to mere conclusions from the facts stated, or the legal effect of the provisions of section 7 of the Wisconsin enabling act, or the provisions of the treaties with the Indians. These are matters for the court exclusively. (*Daniel's Chancery Pleading and Practice*, Vol. I, p. 552, fifth edition; *Maese* v. *Herman*, 17 Appeals, D. C., 52, 59; *Cosmos Exp. Co.* v. *Gray Eagle Company*, 190 U. S., 301, 308.)

B.

The Rule of Construction Applicable to the Provisions of an Indian Treaty.

The words of an Indian treaty are to be construed as they were understood by the Indians, and not to

their prejudice. (*Worcester* v. *State of Georgia*, 6 Pet., 515, 582; *Choctaw Nation* v. *United States*, 119 U. S., 1, 28; *Minnesota* v. *Hitchcock*, 185 U. S., 373, 396; *United States* v. *Rickert*, 188 U. S., 432, 443; *Matter of Heff.*, 197 U. S., 488, 499; *United States* v. *Winans*, 198 U. S., 371, 380–381; *Francis* v. *Francis et al.*, 99 N. W. Rep., 14.)

C.

The Rule Governing the Construction of the Provisions of a School Grant to a State by the Government.

1. The grant describes and is confined to public lands. Lands are not public unless they are subject to sale or other disposal under the general land laws. They are not subject to sale and disposal under such laws if, at the date of the grant, they are burdened with an Indian right of occupancy. Nor are they public lands, as the term is understood, until surveyed into townships and designated by sections. (*Newhall* v. *Sanger*, 92 U. S., 761, 763; *Leavenworth, etc., Railway Company* v. *United States*, 92 U. S., 733, 741; *Missouri, Kansas and Texas Railroad Company* v. *Roberts*, 152 U. S., 114, 119; *Northern Pac. R. R. Co.* v. *Musser-Sauntry Company*, 168 U. S., 604, 609; *Tyler B. Thompson*, 32 L. D., 468, 470.)

2. No title to sections mentioned in a school grant vests in a State until the same are identified by a public survey. (*Gaines* v. *Nicholson*, 9 How., 356, 365; *Cooper* v. *Roberts*, 18 How., 173, 179; *Sherman* v. *Buick*, 93 U. S., 209, 214–215; *Heydenfeldt*

v. *Daney Gold, etc., Company*, 93 U. S., 634, 640; *Beecher* v. *Wetherby*, 95 U. S., 517, 524; *Water and Mining Company* v. *Bugbey*, 96 U. S., 165, 167; *Minnesota* v. *Hitchcock*, 185 U. S., 373, 393; *Bullock* v. *Rouse*, 81 Calif., 591, 593–594–595; *State of Colorado*, 6 L. D., 412, 415; *Barnhurst* v. *State of Utah*, 30 L. D., 314, 317; *Mahoganey Number 2 Lode Claim*, 33 L. D., 37.)

3. Sections of land contemplated by a school grant which, while unsurveyed, fall within an Indian reservation are subject to the Indian right of occupancy, and until such occupancy has been extinguished such sections are in suspension. (*Cherokee Nation* v. *Georgia*, 5 Pet., 1, 48; *Wilcox* v. *Jackson*, 13 Pet., 498, 513; *Gaines et al.* v. *Nicholson et al.*, 9 How., 356, 364–365; *United States* v. *Cook*, 19 Wallace, 591, 593; *Leavenworth, etc., Railway Company* v. *United States*, 92 U. S., 733, 742–743, 745; *Beecher* v. *Wetherby*, 95 U. S., 517, 526; *Buttz* v. *Northern Pacific R. R. Company*, 119 U. S., 55, 66, 70, 71; *Bardon* v. *Northern Pacific Railroad Co.*, 145 U. S., 535, 538–539; *United States* v. *Thomas*, 151 U. S., 577, 582, 583, 584; *Missouri, Kansas and Texas Ry. Company* v. *Roberts*, 152 U. S., 114, 116, 117, 118, 119, 120, 121; *Spalding* v. *Chandler*, 160 U. S., 394, 402, 403–405; *Pine River Logging Company* v. *United States*, 186 U. S., 279, 284; *Minnesota* v. *Hitchcock*, 185 U. S., 373, 388, 389; *Barker* v. *Harvey*, 181 U. S., 481, 490–492; *United States* v. *Rickert*, 188 U. S., 432, 437, 441; *Scott* v. *Carver*, 196 U. S., 100, 109,

111; *United States* v. *Winans*, 198 U. S., 371, 380, 381; *Northern Pacific Railroad Company* v. *Maclay et al*, 61 Fed., 554, 556; *Gibson* v. *Anderson*, 131 Fed. Rep., 39, 42; *Buster* v. *Wright*, 135 Fed. Rep., 947, 952; *United States* v. *Blendauer*, 122 Fed. Rep., 703, 708; *Francis* v. *Francis et al.*, 99 N. W. (Michigan), 14; *State of Colorado*, 6 L. D., 412, 418; *Callanan et al.* v. *Chicago, Milwaukee and St. Paul Ry. Co.*, 10 L. D., 285, 288; *Henry Sherry*, 12 L. D., 176, 178, 180; *State of Louisiana*, 17 L. D., 440; *State of Wisconsin*, 19 L. D., 518, 519; *State of Minnesota*, 28 L. D., 374, 380; Opinion Asst. Attorney-General Van De Vanter to Secretary of the Interior (unreported), dated Nov. 27, 1901. See copy appendix.)

4. If, at the time of the public survey, a tract of land contemplated by a school grant is encumbered by a right of occupancy in an Indian tribe, the State may elect to take equivalent lands, or it may wait until such right of occupancy has been extinguished and take the land contemplated. (*Minnesota* v. *Hitchcock*, 185 U. S., 373, 392, 393; *State of Colorado*, 6 L. D., 412, 418; *State of Colorado*, 12 L. D., 70, 71; *State of Louisiana*, 17 L. D., 440.)

5. If, at the date of a school grant to a State, the sections are not identified by the Government survey, and are within an Indian reservation, Congress is not obliged to transform them from their original status, and may dispose of them for other purposes. (*Minnesota* v. *Hitchcock*, 185 U. S., 373, 393, 394.)

D.

The Rule in Regard to the Creation of an Indian Reservation.

1. It is not necessary that the treaty providing for a reservation should describe the particular tract to be thereafter occupied by the Indians, nor is it necessary that a particular tract be designated for that purpose by Congress or by the President. If, after the treaty is signed, the Indians occupy a particular tract without objection by, or interference from, the Government, such tract is a reservation to the same extent as though it had been specifically designated by the treaty. (*United States* v. *Carpenter*, 111 U. S., 347, 349; *Spalding* v. *Chandler*, 160 U. S., 394, 404; *Minnesota* v. *Hitchcock*, 185 U. S., 373, 390, 391; *State of Minnesota*, 22 L. D., 388.)

2. A treaty which provides for a reservation for the Indians is a grant of rights from and not to them, and a retention to them of rights not granted. (*United States* v. *Winans*, 198 U. S., 371, 381.)

E.

The Duty and Power of the Secretary of the Interior in Respect to Indian Reservations.

1. The Secretary of the Interior, under the direction of the President, has the power, and it is his duty, to prevent intrusion upon Indian reservations and to remove intruders therefrom. (*Morris* v. *Hitchcock*, 194 U. S., 384, 391, 392; *United States* v. *Mullin*,

71 Fed. Rep., 682, 288, 289; *Eells* v. *Ross*, 64 ib., 417, 419; *Beck* v. *Flournoy*, 65 ib., 30; 27 U. S., App. 618; 168 U. S., 996; *Pilgrim et al.* v. *Beck et al.*, 69 ib., 895; *Maxey* v. *Wright*, 54 S. W., 307; 23 Ops. Attys. General, 218.)

2. Where a treaty with an Indian tribe, or an act of Congress, provides that an Indian reservation shall be allotted to the Indians in severalty, the Secretary of the Interior, pending allotment, has jurisdiction over the reservation and the power to remove intruders therefrom, and the courts will not interfere with his action in respect to allotment or with the exercise of his power to remove intruders. (*Morris* v. *Hitchcock*, supra; *Brown* v. *Hitchcock*, 173 U. S., 473, 477; *New Orleans* v. *Payne*, 147 ib., 261, 264, 267.)

ARGUMENT.

Whatever right or title the State of Wisconsin has to the lands in controversy is based upon the provisions of its school grant contained in section 7 of the enabling act of August 6, 1848 (9 Stat., 56, 58), and which reads as follows:

> That section numbered sixteen, in every township of the public lands in said State and, where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools.

By virtue of this grant the State alleges (Subdv. VII, p. 8, second amended bill) that when admitted into the Union it—

> became vested with an absolute right in and to all the sections sixteen within [the territory ceded to the United States by the Chippewa Indians under article one of the treaty of March 1, 1843] subsequently surveyed by the United States with the right in said State to have any temporary possession and occupancy of the Indians * * * terminated by the United States.

The allegations so set forth in said subdivision 7, as well as all other statements in the bill to the effect that the State is vested with and has a complete title to and has absolute dominion over the sections 16 in question, are merely statements of the legal effect of the treaties, laws, and documents referred to in the second amended bill, hence are not admitted by the demurrer. (*Cosmos Company* v. *Gray Eagle Company*, 190 U. S., 301, 308; *Maese* v. *Herman*, 17 Appeals, D. C., 52, 59.)

In the case last cited the court states:

> It is a well-settled principle in the law of demurrer that while the demurrer admits as true, for the purposes of the decision invoked by it, all facts well and sufficiently pleaded, yet it does not admit as true mere matters of law which the pleader may think proper to state in his pleadings, nor the conclusions drawn from the facts stated therein. That is for the court exclusively. Nor does the demurrer in any manner admit the correctness of an allegation as to the construction of a statute, or of a grant, or other document, or

official act, that may be insisted upon by the pleader, as the foundation of his claim and title, or that may be set up in opposition thereto. That is matter of law, for determination by the court. These propositions are too clear to require citations of authority for their support.

DEFENDANT'S CONTENTION.

The defendant, as matter of law, contends that the claim of the State is not warranted by the allegations of fact contained in the second amended bill of complaint, which are admitted to be true by the demurrer, and that the court is without jurisdiction in respect to the subject-matter of the action. This contention is based upon the following propositions:

1. That whatever right or title the State has or had to the lands embraced within the sections 16 in controversy if any it has or had, is subject to the right of occupancy by the La Pointe band of the Chippewa tribe of Indians, and by the Wisconsin band of the same tribe, and that until such occupancy ceases or the right is extinguished, neither the State nor its grantees are authorized to take possession of the same, or any part thereof, or to make improvements thereon or to remove timber therefrom.

2. That the lands embraced in the sections 16 which fall within the La Pointe Reservation are subject to allotment in severalty to such members of the La Pointe band of the Chippewa tribe of Indians as are entitled to allotments under the stipulations contained in article 3 of the said treaty of 1854, and under the provisions of the said acts of February 8, 1887, and of February 11, 1901, provided there are not sufficient other lands for such purpose within said reservation. And that the lands embraced in the sections 16 which fall within the Flambeau Reservation are subject to allotments in severalty to such mem-

bers of the Wisconsin band of the Chippewa tribe of Indians as are entitled to allotments under the stipulations contained in article 3 of the said treaty of 1854, and the provisions of the act of February 8, 1887, provided there are not sufficient other lands for such purpose within the Lac Du Flambeau and Lac Court Orielles reservations.

3. The question in regard to what Indians are entitled to allotments of land within said reservations is administrative or political in its nature, to be determined by the Indian Bureau, and its action in the premises can not be controlled or interfered with by the courts either by injunction or mandamus proceedings. Not until the Indian Bureau has finally acted in the matter may the courts review its action and correct it if wrong.

4. That until the Indian right of occupancy has been extinguished, either by act of Congress or by the acceptance by all of the Indians on said reservation of allotments and patents therefor, as Secretary of the Interior, the defendant is clothed with the power, and it is his duty, to prevent any person or persons from interfering with the possession, use, and enjoyment by the Indians of all or any part of said reservations, including the lands within the sections 16 in controversy.

5. Even though the right of occupancy in the Indians were now extinguished, so far as concerns the La Pointe Reservation, the State of Wisconsin has no such interest as entitles her to bring an action in any court in regard to any section 16 therein.

DEFENDANT'S FIRST PROPOSITION.

That whatever right or title the State has or had to the lands embraced within the sections 16 in controversy, if any it has or had, is subject to the right of occupancy by the La Pointe band of the Chippewa tribe of Indians, and by the Wisconsin band of the same tribe, and that until such occupancy ceases, or the right is extinguished neither the State nor its grantees are authorized to take possession of the same, or any part thereof, or to make improvements thereon or remove timber therefrom.

This proposition is supported by the facts expressly admitted in the second amended bill, and by inference logically to be drawn therefrom and the law applicable to such facts. For convenience of reference these facts are restated here and are as follows:

1. By article 1 of the treaty between the Chippewa Indians of the Mississippi and Lake Superior and the United States, dated March 28, 1843 (7 Stats. 791), the former ceded to the latter a large tract of land which included all the land now embraced in the sections 16 in controversy.

2. By article 2 of the said treaty said Indians reserved—

> the right of hunting on the ceded territory with the other usual privileges of occupancy until requested to remove by the President of the United States.

3. By the first article of the treaty between the United States and the same tribe of Indians dated September 30, 1854, and proclaimed January 29, 1855 (10 Stat., 1109), the latter ceded to the former a large tract of land in the Territory, now the State, of Minnesota, and that by the second article thereof it was provided, among other things, in effect, that a tract of country therein described, formerly ceded by the treaty of March 28, 1843, and from the date of the second treaty until the present time known and designated as the La Pointe or Bad River Reservation, be set apart and withdrawn from sale for the use of the La Pointe band of Chippewa tribe of Lake Superior Indians, which tract included the lands now

embraced in the sections 16 in controversy within townships 46 and 47 north, ranges 2 and 3 west; township 48 north, range 1 west, and township 47 north, range 1 west; that there be set apart and withheld from sale for the use of the Wisconsin band of Chippewas of Lake Superior—

> A tract of land lying about Lac Du Flambeau and another tract on Lac Court Orielles, each equal in extent to three townships, the boundaries of which shall be hereafter agreed upon or fixed under the direction of the President.

That immediately thereafter the said Wisconsin band of Indians, with the consent of the United States, took possession of the tract of land known as the Flambeau Reservation, and have, ever since, occupied said tract, which tract includes, among other lands, the lands now embraced in sections 16 in controversy in township 41 north, range 4 east; township 40 north, range 5 east, and township 41 north, range 5 east.

4. That by article 11 of the last-named treaty, the United States agreed, among other things, in effect, that neither the La Pointe band of Indians or the Wisconsin band of Indians, or any member of either of said bands, should "be required to remove from the homes * * * set apart for them" by the terms of the said treaty.

5. That the right of occupancy secured to the La Pointe and Wisconsin band of Indians in respect to the lands embraced in the sections 16 in controversy has not been extinguished.

6. That the lands embraced within the sections 16 in controversy had not been designated by the public survey when Wisconsin was admitted into the Union, nor until after the promulgation of the treaty of 1854.

In considering and determining the force and effect of these facts, the first question which presents itself is:

What rights were guaranteed to the Indians, in respect to the lands involved, by the treaties mentioned?

This question is to be determined not by the application to provisions of the treaties of the ordinary rules of statutory construction, but by what the court believes was the understanding of the Indians themselves at the dates the treaties were made.

Upon this question Mr. Justice McLean, in *Worcester* v. *State of Georgia* (6 Pet., pp. 515, 582), says:

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

In *Choctaw Nation* v. *United States* (119 U. S., 1, 28) the court speaking through Mr. Justice Matthews, said:

> The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former,

> and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.

In *Minnesota* v. *Hitchcock* (185 U. S., 373) the court uses this language at page 396:

> If the language [of a treaty] carries upon its face one obvious meaning, and would naturally be so understood by the Indians, that construction within all the rules respecting Indian treaties must be enforced.

It will be noticed that article 2 of the first-named treaty, second amended bill, page 5, conferred upon the President the power to remove the Indians at any time from the lands reserved by said treaty, or from any part thereof. But that by the second treaty, article 11, second amended bill, page 15, this power was not conferred so far as the land ceded by the first treaty is concerned and reserved by the second treaty, but conferred only in respect to such lands as were ceded by the second treaty, none of which are in controversy here.

In view of the stipulations contained in article 2 of the first treaty can it be contended otherwise than that subsequent to its date, and prior to the date of the second treaty, the Chippewa tribe of Indians understood that they were to have the undisturbed use, possession, and enjoyment of the tracts of land in controversy until such time as the President saw fit to remove them? And can it be seriously questioned that when the said tribe agreed to the second treaty they believed they had secured, by article 11 thereof, to the La Pointe band and the Wisconsin band the possession, use, and enjoyment of the tracts of land now embraced in the sections 16 in controversy, and that neither band would be thereafter disturbed in said possession, use, and enjoyment?

Defendant concedes, however, that notwithstanding the belief and understanding of the Indians, Congress at any time could have terminated the privileges secured to the Indians by either of said treaties and provide for their removal from all or any part of the land reserved to them thereby, and to extinguish the right of occupancy so secured to the Indians.

The second question that is presented, therefore, is:

Has Congress extinguished such right of occupancy?

The answer to this question depends upon the construction to be placed upon the language of the Wisconsin school-land grant, which is found in section 7 of the enabling act (9 Stat., 56, 58).

Like all grants of a similar character it contemplates "public lands" only. "The words 'public lands,'" says this court in *Newhall* v. *Sanger* (92 U. S., 761, at page 763), "are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." The same meaning to the words "public lands" is given by the court in *Bardon* v. *Northern Pacific Railroad Company* (145 U. S., 535, 538) and *Mann* v. *Tacoma Water Company* (153 U. S., 273, 284). (See *Barker* v. *Harvey*, 181 U. S., 481, 490.)

The lands embraced within the sections 16 in controversy were not subject to sale or other disposal under general laws when the school grant was made, or when it became effective, if prior thereto they had not been designated by the public survey.

This proposition is supported by numerous decisions of this and other courts and hereinafter referred to.

Were the lands embraced in said sections surveyed when the grant was made or when it became effective?

The allegations of fact in respect to this matter are found in subdivisions 10 and 11 of the second amended bill, pages 16 and 17, and read as follows:

> That in the year 1847 the east line of township numbered 46 north, of range 2 west, and the west line of township number 47 north, range 1 west, were duly surveyed by the United States; that in the year 1852 all of the township lines of town 47 north, ranges 2 and 3 west, and the south and west lines of town 48, ranges 2 and 3, and the south, west,

and north lines of township 48 north, ranges 2 and 3 west, were duly surveyed by the United States, and the sectional subdivisions of each of said townships were duly surveyed at various times thereafter in the years 1856, 1858, and 1873.

That for the purpose of setting apart a tract of land lying about Lac Du Flambeau for other Wisconsin bands of said Indians mentioned in subdivision 3 of article 2 of said treaty, surveys were made under the direction of the United States as follows: In July, 1857, the north line of townships 40 and 41, 4 and 5 east; in September, 1860 the east line of said towns 40 and 41, 4 east; and in September, 1861, the south, east, and west lines of towns 40 and 41, 5 east; and in August, 1864, the south and west lines of townships 40 and 41–4 east; and in July, 1865, each of said townships was subdivided by such surveys into sections.

Chapter IX of the Revised Statutes, second edition, 1878, provides for the survey of the public lands. The first, second, and third paragraphs of section 2395 read as follows:

SEC. 2395. The public lands shall be divided by north and south lines run according to the true meridian, and by others crossing them at right angles, so as to form townships of six miles square, unless where the line of an Indian reservation or of tracts of land heretofore surveyed or patented, or the course of navigable rivers, may render this impracticable; and in that case this rule must be departed

from no further than such particular circumstances require.

Second. The corners of the townships must be marked with progressive numbers from the beginning; each distance of a mile between such corners must be also distinctly marked with marks different from those of the corners.

Third. The township shall be subdivided into sections, containing, as nearly as may be, six hundred and forty acres each, by running through the same, each way, parallel lines at the end of every two miles, and by making a corner on each of such lines at the end of every mile. The sections shall be numbered, respectively, beginning with the number one in the northeast section and proceeding west and east alternately through the township with progressive numbers till the thirty-six be completed.

As to what constitutes a survey within the meaning of said section 2395 is clearly and concisely stated in the case of *Bullock* v. *Rouse* (81 Cal., 590), at page 594, as follows:

> The Government survey of the public lands is made by running and marking the lines of the townships and sections, and by marking the corners of the townships, sections, and quarter sections. (Rev. Stats., secs. 2395 et seq.)
>
> It is not necessary that a whole township be surveyed at one time, and often different parts of a township are surveyed at different times, but no survey of any part is complete until the lines and corners about that part

> are run and established as required by the statute. "Even after a principal meridian and a base line have been established, and the exterior lines of the township have been surveyed, neither the sections nor their subdivisions can be said to have any existence until the township is subdivided into sections and quarter-sections by an approved survey. The lines are not ascertained by the survey, but they are created." (*Robinson* v. *Forrest*, 29 Cal., 325.) "There is, in fact, no such tract of land as that described in the petition until it has been located within the Congressional township, by an actual survey and establishment of the lines, under the authority of the United States, and the survey has been approved by the proper United States surveyor-general. A person may approximate to the lines that may be run—may surmise the precise lines—but the tract has no separate legal identity until the survey is made and approved under the authority of Congress." (*Middleton* v. *Low*, 30 Cal., 605.)

The doctrine laid down in this case has been followed by the Interior Department in *Barnhurst* v. *State of Utah* (30 L. D., 314) and also in *Mahoganey Number 2 Lode Claim* (33 L. D., 37).

In the case of *Gaines et al* v. *Nicholson et al* (9 How., 306) the State of Mississippi had acquired from the Government for schools purposes a right to every sixteenth section of the public land within the State. At the time of the grant a large tract of land, including the particular land in controversy in that case,

was occupied by the Choctaw Nation of Indians. Subsequent to the grant and before the survey said nation ceded to the Government a large tract of territory, including the tract in controversy, reserving a section to an Indian named Wall "to be located upon some portion of the ceded territory—what, in common parlance, is denominated a float." Wall assigned his right to Gaines and Green, who subsequently selected the section 16 in controversy in that suit. Nicholson and others were school trustees and had leased the section to one Hillman. Gaines and others thereafter instituted an action of ejectment against Hillman, whereupon Nicholson and others filed a bill in equity against Gaines and others, praying, among other things, that they be enjoined from proceeding with the action of ejectment on the law side of the court. In disposing of the case, this court said in effect (p. 365) that under the terms of the school grant no title vested in the State until the lands contemplated by the grant had been sectionized by the public survey.

In *Cooper* v. *Roberts* (18 How., 173), at page 179, the court says among other things:

> The State of Michigan was admitted to the Union, with the unalterable condition " that every section No. 16, in every township of the public lands, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the State for the use of schools." We agree, that until the

> survey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object, upon which it can attach, and if there is no legal impediment the title of the State becomes a legal title. The *jus ad rem* by the performance of that executive act becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others. (*Gaines* v. *Nicholson*, 9 How., 356.)

The above was quoted and approved in *Beecher* v. *Wetherby* (95 U. S., 517, 524), also in *Minnesota* v. *Hitchcock* (185 U. S., 373, 393).

In *Heydenfeldt* v. *Daney Gold, etc., Company* (93 U. S., 634, 640) the court, having under consideration the grant of school lands to the State of Nevada, among other things says:

> Until the status of the lands was fixed by the survey and they were capable of identification, Congress reserved absolute power over them; and if, in exercising it, the whole or any part of a sixteenth or thirty-sixth section has been disposed of, the State was to be compensated by other lands equal in quantity and as near as may be, in quality.

In *Bullock* v. *Rouse* (81 Cal., 590) the Supreme Court of that State, having under consideration the California school grant, quotes, with approval, at page 594, the following language from the decision in *Grogan* v. *Knight* (27 Cal.,522), viz:

> It has also been said by the Supreme Court of this State: "It may be admitted that by virtue of the act of Congress of 1853 the State became entitled to an amount of land equal to two sections in each Congressional township, yet as the State did not by virtue of that act, acquire the title to any specified tract of land, and could not acquire it until the survey had been made under the authority of Congress, it necessarily follows that prior to such survey she has no power or authority to confer upon a purchaser from her any right, title, or interest in any specified parcel of such lands." (*Grogan* v. *Knight*, 27 Cal., 522.)

Unless and until the Indian right of occupancy to the land involved has been extinguished, the right of the State of Wisconsin to the same is in suspension.

The bill practically admits that such right has not been extinguished (subdivisions 6 and 16, pages 7 and 21), but if no such admission was made, the court could take judicial notice of the fact that such right has not been extinguished, for the reason that the dealings of the Government with the Indian tribes form such an important phase of the political history of the country and its development that the courts will take judicial notice of those dealings as

shown by the acts of Congress, public documents, and proclamations of executive officers, and the records of the Interior Department. (*Knight* v. *U. S. Land Association*, 142 U. S., 161, 168, 169.)

It is submitted, however, that such right of occupancy in view of the provisions of article eleven of the treaty of 1854 could not be extinguished except by act of Congress, unless the acceptance of allotments and patents to the same works an extinguishment.

In the opinion rendered by Mr. Justice Baldwin, in *Cherokee Nation* v. *State of Georgia*, in 5 Peter,1, he states, among other things, at page 48:

> Indians have rights of occupancy to their lands as sacred as the fee simple absolute title of the whites; but they are only rights of occupancy, incapable of alienation, or being held by any other than common right without permission from the Government.

The above quotation was referred to and approved in the *United States* v. *Cook* (19 Wall., 591, 593), and in *Leavenworth, etc., Railroad Company* v. *United States* (92 U. S., at page 243), and also in *Beecher* v. *Wetherby* (95 U. S., at page 525). In the case of *Minnesota* v. *Hitchcock* (185 U. S., page 389), it is stated:

> The Indian's right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon.

In the case of *Gaines et al.* v. *Nicholson et al.* (9 Howard), the court uses the following language at pages 364 and 365:

> The State of Mississippi acquired a right to every sixteenth section by virtue of these acts, on the extinguishment of the Indian right of occupancy, the title to which, in respect to the particular sections, became vested, if vested at all, as soon as the surveys were made and the sections designated. No patent was necessary or is ever issued, for these school sections. And the question presented is whether the general right reserved to Wall under the treaty to select a section of land in the ceded territory operated to suspend the vesting of the title in the State till a selection could be made and patent issued under the direction of the President, or whether the selection in respect to these general floating rights that bind no particular parcel or section must be made in subordination to the right acquired by the State. * * * No previous grant of Congress could be paramount according to the right of occupancy which this Government has always conceded to the Indians within her jurisdiction.

In this connection the court further adds, "that an Indian holds, strictly speaking, not under the treaty of cession, but under his original title confirmed by the Government in the act agreeing to the reservation."

As to the nature and character of the Indian's title by occupancy, the court, in *United States* v. *Cook* (19 Wall. 591, 593, 594), says:

> This right of use and occupancy by the Indians is unlimited. They may exercise it at their discretion. If the lands in a state of nature are not in a condition for profitable use, they may be made so. * * * But a tenant for life has all the rights of occupancy in the lands of a remainder-man. The Indians have the same rights in the lands of their reservations. What a tenant for life may do upon the lands of a remainder-man the Indians may do upon their reservations, but no more.

It is elementary that a tenant for life under the common law was entitled to the undisturbed use and occupation of the lands of the remainder-man. Blackstone in this connection (Cooley's Edition, Book 2, p. 120) says, "For he hath a right to the full enjoyment and use of the land and all its profits during his estate therein."

In *Leavenworth, etc., R. R. Company* v. *United States* (92 U. S., 733), it was held (syllabus):

> The doctrine in *Wilcox* v. *Jackson* (13 Pet., 498) that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands and that no subsequent law or proclamation will be construed to embrace it or to operate upon it, although no exception be made of it, reaffirmed and held to apply with more force to Indian than to

military reservations, inasmuch as the latter are the absolute property of the Government, whilst in the former other rights are vested.

Where the right of an Indian tribe to the possession and use of certain lands as long as it may choose to occupy the same is assured by treaty, a grant of them, absolutely or *cum onere*, by Congress to aid in building a railroad violates an express stipulation, and a grant in general terms of "land" can not be construed to embrace them.

At page 742 the court says, among other things:

As the transfer of any part of an Indian reservation secured by treaty would also involve a gross breach of the public faith, the presumption is conclusive that Congress never meant to grant it. * * *

As long ago as *The Cherokee Nation* v. *Georgia* (5 Pet., 1), this court said that the Indians are acknowledged to have the unquestionable right to the lands they occupy until it shall be extinguished by a voluntary cession to the Government; and recently, in *United States* v. *Cook* (19 Wall., 591), that right was declared to be as sacred as the title of the United States to the fee.

At page 747 the court says, among other things:

Every tract set apart for special uses is reserved to the Government to enable it to enforce them. There is no difference in this respect whether it be appropriated for Indian or for other purposes.

In *Beecher* v. *Wetherby* (95 U. S., 517), at page 525, the court, among other things, said:

> But the right which the Indians held was only that of occupancy. The fee was in the United States subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians. That occupancy could only be interfered with or determined by the United States.

In *Buttz* v. *Northern Pacific Railroad Company* (119 U. S., 55), it was held (syllabus):

> The grant by the act of Congress of July 2, 1864, to the Northern Pacific Railroad Company of lands to which the Indian title had not been extinguished operated to convey the fee to the company, subject to the right of occupancy by the Indians.
>
> The manner, time, and conditions of extinguishing such right of occupancy were exclusively matters for the consideration of the Government, and could not be interfered with nor put in contest by private parties.

In *Bardon* v. *Northern Pacific Railroad Company* (145 U. S., 535), the principles announced in the foregoing cases of *Wilcox* v. *Jackson, Leavenworth, etc., Railroad Company* v. *The United States*, and *Buttz* v. *The Northern Pacific Railroad Company* were referred to and approved.

In *United States* v. *Thomas* (151 U. S.), page 577, the court said, in regard to school grants, at page 583:

> The general rule established by the Land Department with reference to the school lands in the different States is that the title to them vests in the several States in which the land is situated, subject to any prior right of occupation by the Indians or others which the Government had stipulated to recognize.

In the case of the *Missouri, Kansas and Texas Railroad Company* v. *Roberts* (152 U. S., 115), it appeared, among other things, that by the first article of the treaty of June 2, 1825 (7 Stats., 240), between the United States and the Osage tribe of Indians, the latter ceded to the former a large tract of land, part of which was afterwards included within the boundaries of the territory now the State of Kansas.

By the second article thereof a certain tract now within said State was "reserved to and for the Great and Little Osage tribes of Indians or nations aforesaid so long as they may choose to keep the same." Subsequent to the date of this treaty, and on May 30, 1854, an act was passed organizing the Territories of Nebraska and Kansas (10 Stats., 277), the thirty-fourth section providing for a grant of land to the Territory of Kansas for school purposes in the following words (289):

> *And be it further enacted*, That when the lands in the said Territory shall be surveyed under the direction of the Government of the United States, preparatory to bringing the

> same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purposes of being applied to schools in said Territory and in the States and Territories hereafter to be erected out of the same.

January 29, 1861 (12 Stat., 126), Congress passed an act for the admission of Kansas into the Union under a constitution adopted by the people of the Territory of Kansas October 4, 1859. Section 1 of said act provided, among other things, in effect, that nothing in the constitution should be construed to impair the rights of person or property now pertaining to the Indians in the Territory of Kansas so long as such rights should remain unextinguished by treaty between the United States and the Indians. Section 3 provided in part—

> That sections numbered sixteen and thirty-six in every township of public lands in said State—and where either of said sections or any part thereof has been sold or otherwise been disposed of other lands equivalent thereto and as contiguous as may be—shall be granted to said State for the use of schools.

July 26, 1866 (14 Stat., 289), Congress made a grant of lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific Railway, etc. February 3, 1870, the name of said company was changed to that of the Missouri, Kansas and Texas Railway Company.

Section 2 of said act provided as follows:

> That the sections and parts of sections of land which by the aforesaid grant shall remain in the United States within ten miles on each side of said road shall not be sold for less than double the minimum price of public lands when sold: *Provided*, That actual bona fide settlers under the preemption laws of the United States may, after due proof of settlement, improvement, and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: *Provided also*, That settlers under provisions of the homestead act, who make their settlement after the passage of this act and comply with the terms and requirements of said act, shall be entitled, within the said limits of ten miles, to patents for an amount not exceeding eighty acres each.

By the treaty of September 29, 1865 (14 Stat., 687), between the United States and the Great and Little Osage Indians, which was subsequently amended by the Senate and signed by the President January 21, 1867, the said Osage tribe of Indians ceded a part of their lands in Kansas to the United States. As amended the first article of the treaty provided that the lands so ceded—

> shall be surveyed and sold, under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws, including any act granting lands to the State of

> Kansas in aid of the construction of a railroad through said lands, but no preemption claim or homestead settlement shall be recognized.

Subsequently a question arose between the Missouri, Kansas and Texas Railway Company and Roberts involving the right of possession of lands within section 16, in township 34, Labette County, Kans., to which the railway company claimed title under the aforesaid act of July 26, 1866, while Roberts claimed title through the State of Kansas. In referring to the treaty with the Osage Indians it is stated in 152 U. S., 118:

> And the setting apart by statute or treaty with them of lands for their occupancy is held to be of itself a withdrawal of their character as public lands, and consequently of the lands from sale and preemption.

And again, on page 119, the court in speaking of the school grant contained in section 34 of the act of May 30, 1854, among other things, says:

> It could only apply to such lands as were public lands, for no other lands in our land system are subdivided into sections, nor could it embrace lands which had been set apart and reserved by statute or treaty with them for the use of the Indians.

Defendant concedes that even though the lands in controversy had not been surveyed when Wisconsin was admitted into the Union Congress could have, by the school grant, provided for the extinguishment of the Indian right of occupancy, but he submits that Congress did not so provide, for the reason that there are no express terms in the grant to that effect.

To support this proposition reference is had to the case last cited, page 118, where the court in effect holds that where a right of occupancy to certain lands is reserved to an Indian tribe that this right can not be disturbed by those claiming under a subsequent grant or statute unless such grant or statute in express terms indicates an intention on the part of Congress to change the possession of the lands so reserved. At page 119 it is further stated:

As early as 1839 it was held, in *Wilcox* v. *Jackson* (13 Pet., 498):

> That a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace or operate upon it, although no exception be made of it.

The reservation referred to there was of land for military purposes, and in *Leavenworth, etc., R. R. Co.* v. *United States* (92 U. S., 733), page 745, it was said that this doctrine—

> applies with more force to Indian than to military reservations. The latter are the absolute property of the Government; in the former, other rights are vested. Congress can not be supposed to grant them by a subsequent law, general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for such a purpose.

As to the effect of the act for the admission of Kansas the court observed at page 120 (152 U. S.):

> The Indians continued thereafter, as previously, in possession of the lands, and their rights, whatever their nature and extent, were not extinguished by anything in the act of admission of the State into the Union nor at the time of the grant of a right of way by the act of July 26, 1866.

In *Spalding* v. *Chandler* (160 U. S., 394) it is stated at pages 402, 403:

> It has been settled by repeated adjudications of this court that the fee of the lands in this country in the original occupation of the Indian tribes was from the time of the formation of this Government vested in the United States. The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land, with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered to the Government. When Indian reservations were created, either by treaty or Executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated.

In *Minnesota* v. *Hitchcock* (185 U. S., 373) the court uses the following language at pages 388, 389:

> Whether this tract, which was known as the Red Lake Indian reservation, was properly called a reservation, as the defendant con-

> tends, or unconceded Indian country, as the plaintiff insists, is a matter of little moment. Confessedly the fee of the land was in the United States, subject to a right of occupancy by the Indians. That fee the Government might convey, and whenever the Indian right of occupancy was terminated (if such termination was absolute and unconditional) the grantee of the fee would acquire a perfect and unburdened title and right of possession. At the same time, the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon.

In *Scott* v. *Carew* (196 U. S., 100), at page 109, the court said, among other things:

> Where particular tracts have been taken possession of by rightful orders of an Executive Department, to be used for some public purpose, Congress in legislating will be presumed to have intended no interference with such possession nor a sale or disposal of the property to private individuals. Such has been the rule obtaining in the land department, as well as in the courts.

At page 111 it was stated:

> Many authorities might be cited to the proposition that a prior appropriation is always understood to except lands from the scope of a subsequent grant, although no reference is made in the latter to the former.

In the case of Henry Sherry (12 L. D., 176) Assistant Attorney-General Shields, in an opinion to the Secretary of the Interior, held (syllabus) that—

> The fee to the school sections within the Menomonee Indian Reservation passed by the school grant to the State, subject, however, to the Indian right of occupancy, which yet exists, and neither the State nor its assignee can in any way interfere with the full enjoyment of said right.

In the case of the *State of Wisconsin* (19 L. D., 518) it was held (syllabus):

> By the swamp-land grant the State of Wisconsin acquired the title, the naked fee, to the swamp land embraced within the Lac de Flambeau Reservation, subject to the right of Indian occupancy, and while said right exists no action should be taken under said grant looking toward a disturbance of the Indian right.

Assistant Attorney-General Van Devanter, in an opinion rendered to the Secretary of the Interior November 27, 1901 (see Appendix), among other things says, in respect to sections 16 in the La Pointe Indian Reservation:

> The Indian right of occupancy to the sections in question existing at the time of the grant to the State has never been extinguished; and even if the view most favorable to the State be taken it still follows, from what is said in *Beecher* v. *Wetherby* and in other cases, that until the extinguishment of the Indian title the State and its grantees have only the

> naked fee, the right of occupancy being in the Indians, and there is no power or right in the State or its grantees to interfere with or terminate this right of occupancy. That can be done only by the United States, and then only by or in pursuance of some act of Congress. The cutting and removal of the timber from the sections in question at this time would be an unauthorized invasion of the right of occupancy of the Indians, unless done under a law of Congress.

The case of *Beecher* v. *Wetherby* (supra) lends no support to the contention of the State in this case. The land there involved is in Wisconsin and was identified by survey in May or June in 1854, while the Indian treaty which embraced it in an Indian reservation did not take effect until in August, 1854, and the act of Congress under which it was attempted to sell the land for the benefit of the Indian was not enacted until 1871, all of which appears in the opinion of the court. The land, therefore, had been identified by survey before its attempted reservation by the treaty in question there. It further appears in the opinion of the court (see p. 527) that the Indians "had removed from the land in controversy and other sections had been set aside for their occupation."

In commenting upon the case of *Beecher* v. *Wetherby*, the court, in *Minnesota* v. *Hitchcock* (185 U. S., 397, 398), among other things, says:

> The court held that the title of the defendant under the school grant was superior to that of the plaintiff under the sale by the United

States. Two facts are apparent: First, the Menomonee Indians in the first instance received a cash and real estate consideration for the large reservation which they conveyed to the United States; second, that while thereafter a tract was ceded to them to be held as Indian lands are held—a tract which included the section in controversy—and while by an earlier treaty with the Menomonees two townships of such tract (including this particular section 16) had been set apart for the use and benefit of the Stockbridge and Munsee Indians, yet there appears no treaty or agreement with either the Menomonee of Stockbridge or Munsee Indians in reference to the sale of these two townships. Yet, as stated by the court, "when the logs in suit were cut, those tribes had removed from the land in controversy and other sections had been set apart for their occupation." The ruling was that the United States held the fee, subject only to the Indian right of occupancy; that by the school-land section in the enabling act there was a grant, or promise to grant, in either event to be taken as an appropriation of the fee to the State, subject to the Indian right of occupancy; that the Indians had removed from the lands and had received other lands for their occupation; that hence all Indian rights had ceased.

If the school grant to the State of Wisconsin contemplated the tracts in controversy, the State may elect to take equivalent tracts of land, or it may await the extinguishment of the Indian right of occupancy, and then take said tracts. But the Government is not obligated to extinguish the right of occupancy by the Indians.

In the *State of Colorado* (6 L. D., 412), Secretary Lamar, at page 418, says:

> I think, however, the true theory of the school grant is this: That where the fee is in the United States at the date of the survey, and the land is so encumbered that full and complete title and right of possession can not then vest in the State, the State may, if it so desires, elect to take equivalent lands in fulfillment of the compact, or it may wait until the title and right of possession unite in the Government land then satisfy its grant by taking the lands specifically granted.

In the *United States* v. *Thomas* (151 U. S., 577, 583) and in *Minnesota* v. *Hitchcock* (185 U. S., 373, 393) the above language of Secretary Lamar was quoted and approved. It was also quoted and approved by Secretary Noble in the case of the *State of Colorado* (12 L. D., 70, 71).

In *Minnesota* v. *Hitchcock* (185 U. S., 373) the court said, at pages 393, 394:

> But while this is true, it is also true that Congress does not, by the section making the school land grant, either in letter or spirit, bind itself to remove all burdens which may rest upon lands belonging to the Government within the State, or to transform all from their existing status to that of public lands, strictly so called, in order that the school grant may operate upon the sections named. It is, of course, to be presumed that Congress will act in good faith; that it will not attempt to impair the scope of the school grant; that it intends

> that the State shall receive the particular sections or their equivalent in aid of its public school system. But considerations may arise which will justify an appropriation of a body of lands within the State to other purposes, and if those lands have never become public lands the power of Congress to deal with them is not restricted by the school grant, and the State must seek relief in the clause which gives it equivalent sections.

So far as the Indians' right of occupancy to the tracts in controversy within the Flambeau Reservation is concerned, it matters not that neither its boundaries or descriptions "were fixed or determined by the United States until after the lands embraced within said reservation had been surveyed and subdivided into sections," as alleged in Subdivision XIII of the amended bill, page 19. The logical inference to be drawn from the bill, taken as a whole, is, and such is the fact, that long previous to the time of the admission of Wisconsin into the Union and thereafter, to and including the date of the survey and up to the time the boundaries of the said reservation were fixed permanently by the Secretary of the Interior in 1866, the Wisconsin band of Indians, with the consent of the Government used and occupied all of the lands now known as the Flambeau Indian Reservation.

In *Minnesota* v. *Hitchcock* (supra), at page 390, it was stated:

> In order to create a reservation it is not necessary that there should be a formal session or a formal act setting apart a particular tract.

> It is enough that from what has been done there results a certain defined tract appropriated to certain purposes.

In *Spalding* v. *Chandler* (160 U. S., 394) there was presented a question of the origin of an Indian reservation, and in passing upon this question the court at pages 403, 404, says:

> It is not necessary to determine how the reservation of the particular tract subsequently known as the "Indian reserve" came to be made. It is clearly inferable from the evidence contained in the record that at the time of the making of the treaty of June 16, 1820, the Chippewa tribe of Indians were in the actual occupation and use of this Indian reserve as an encampment for the pursuit of fishing. * * *
>
> But whether the Indians simply continued to encamp where they had been accustomed to prior to the making of the treaty of 1820, whether a selection of the tract afterwards known as the Indian reserve was made by the Indians subsequent to the making of the treaty and acquiesced in by the United States Government, or whether the selection was made by the Government and acquiesced in by the Indians, is immaterial. * * *
>
> If the reservation was free from objection by the Government, it was as effectual as though the particular tract to be used was specifically designated by boundaries in the treaty itself. The reservation thus created stood precisely in the same category as other Indian reservations, whether established for general

or limited uses and whether made by the direct authority of Congress in the ratification of a treaty or indirectly through the medium of a duly authorized executive officer.

DEFENDANT'S SECOND PROPOSITION.

That the lands embraced in the sections 16 in controversy which fall within the La Pointe Reservation are subject to allotments in severalty to such members of he La Pointe band of the Chippewa tribe of Indians as are entitled to allotments under the stipulations contained in article 3 of the said treaty of 1854, and under the provisions of the said acts of February 8, 1887, and of February 11, 1901, provided there are not sufficient other lands for such purpose within said reservation. And that the lands embraced in the sections 16 in controversy which fall within the Flambeau Reservation are subject to allotments in severalty to such members of the Wisconsin band of the Chippewa tribe of Indians as are entitled to allotments under the stipulations contained in article 3 of the said treaty of 1854, and the provisions of the said act of February 8, 1887, provided there are not sufficient other lands for such purpose within the Lac Du Flambeau and Lac Court Orielles reservations.

Article 3 of the treaty of 1854 stipulated, among other things, that—

> The United States will define the boundaries of these reserved tracts, whenever it may be necessary, by actual survey, and the President may from time to time, at his discretion, cause the whole to be surveyed and may assign to each head of a family or single person over twenty-one years of age eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs,

> issue patent therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose.

Can there be any doubt how the Indians understood the language of the above stipulations? Can anyone understand it in a sense other than that *all* the lands embraced within said reservations were subject to allotments in severalty to the members of the respective bands occupying the same?

These stipulations were agreed to by the Government before the tracts in controversy were surveyed. Hence Congress had absolute power to set them apart to be allotted to the Indians, notwithstanding the provisions of the Wisconsin school land grant. As was said by the court in *Heydenfeldt* v. *Daney Gold, etc., Co.* (93 U. S., 634, 640):

> Until the *status* of the lands was fixed by a survey and they were capable of identification, Congress reserved absolute power over them, and if in exercising it the whole or any part of a sixteenth or thirty-sixth section has been disposed of, the State was to be compensated by other lands as near as may be in quality.

And in *Minnesota* v. *Hitchcock* (supra), pages 393, 394, it is stated:

> But considerations may arise which will justify an appropriation of a body of lands within the State to other purposes, and if those lands have never become public lands the power of Congress to deal with them is not restricted by the State grant.

In regard to the question whether the agreement with the Indians in 1854 was a disposal of the tracts in controversy if needed to provide allotments for the Indians, the court, in *Leavenworth, etc., R. R. Co.* v. *U. S.* (733, 747), says:

> Every tract set apart for special uses is reserved to the Government to enable it to enforce them. There is no difference in this respect whether it be appropriated for Indian or for other purposes.

Whether, after said tracts were surveyed, Congress could (as it would seem it has attempted), by the act of February 11, 1901 (31 Stats., 766), enlarge the scope of said article 3 by providing for more allotments than were contemplated by it if such enlargement would work to the prejudice of the rights of the State by virtue of its school grant, is not a pertinent question in this case, in view of the following allegation in said subdivision 16, page 21 of the bill, which says:

> That the lands within said reservations, exclusive of the lands in sections sixteen, are sufficient to secure eighty acres to each individual Indian who has hitherto appeared and claimed a right to an allotment. That no allotment has hitherto been allowed to any member of said tribes of any land embraced within any of said sections sixteen.

DEFENDANT'S THIRD PROPOSITION.

The question in regard to what Indians are entitled to allotments of land within said reservations, is administrative or political in its nature, hence to be determined by the Indian Bureau, acting under the direction and supervision of the Secretary of the Interior, and its action in the premises can not be controlled or interfered with by the courts either by injunction or mandamus proceedings. Not until the Indian Bureau has finally acted in any matter may the courts review its action and correct the same if wrong.

That the Indian Bureau of which the Secretary of the Interior is the head, is the tribunal upon which the law has imposed the duty of making allotments of lands to Indians is unquestioned. And it is eqally true that the performance of such duty requires the exercise of judgment and discretion; the ascertainment of facts and the construction of treaties and laws.

In the case of *Gaines* v. *Thompson* (7 Wall., 347, 352, 353), the court, through Mr. Justice Miller, speaking of the right of the judiciary to interfere with the action of an officer of the Executive Department while in discharge of a duty imposed upon him by law, says:

> An officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers and to them alone, and however the courts may, in ascertaining the rights of parties in suits properly before them pass upon the legality of their acts, after

> the matter has once passed beyond their control, there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is that the law reposes this discretion in him for that occasion, and not in the courts. This doctrine therefore is as applicable to the writ of injunction as it is to the writ of mandamus.
>
> In the one case the officer is required to abandon his right to exercise his personal judgment and to substitute that of the court by performing the act as it commands. In the other he is forbidden to do the act which his judgment and discretion tell him should be done. There can be no difference in the principle which forbids interference with the duties of these officers, whether it be by writ of mandamus or injunction.

In the case of *New Orleans* v. *Paine* (147 U. S., 261, 267) the doctrine above announced was approved.

In *Brown* v. *Hitchcock* (173 U. S., 473, 477) the court says:

> As a general rule no mere matter of administration in the various Executive Departments of the Government can, pending such administration, be taken away from such departments and carried into the courts; those departments must be permitted to proceed to the final accomplishment of all matters pending before them, and only after that disposition may the courts be invoked to inquire whether the outcome is in accord with the laws of the United States.

DEFENDANT'S FOURTH PROPOSITION.

That until the Indian right of occupancy has been extinguished, either by act of Congress or by the acceptance by all of the Indians on said reservations of allotments and patents therefor, he, as Secretary of the Interior, is clothed with the power and it is his duty to prevent any person or persons from interfering with the possession, use, and enjoyment by the Indians, or any of them, of all or any part of said reservations, including the lands within the sections 16 in controversy.

The above proposition is based upon sections 441 and 463 of the Revised Statutes, also upon sections 2147 to 2150, inclusive, and is supported by the decisions of this and other tribunals.

By section 441 the Secretary of the Interior is charged with the superintendence of public business relating to the Indians. Section 463 provides that he shall "have the management of all Indian affairs and of all matters arising out of Indian relations."

In respect to the force and effect of sections 2147–2150, inclusive, the Attorney-General, in an opinion given to the Secretary of the Interior September 7, 1900, relating to trespassers upon Indian lands (23 Ops. Atty.-Gen., 214) held (syllabus):

> Sections 2146 to 2150, inclusive, of the Revised Statutes expressly confer the right to use the military forces of the United States in ejecting trespassers upon Indian lands and the grant of this power carries with it the duty of its exercise.

The above was quoted with approval by this court in *Morris* v. *Hitchcock* (194 U. S., 384, 392). See also

United States v. *Rickert* (188 U. S., 432, 439); *Cherokee Nation* v. *Hitchcock* (187 U. S., 294, 307, 308); *United States* v. *Thomas* (151 U. S., 577, 582, 583); *Beecher* v. *Wetherby* (95 U. S., 517, 525); *United States* v. *Mullin* (71 Fed. Rep., 682, 685, 686); *United States* v. *Flournoy Live Stock Co.* (69 ib., 886, 892); *Pilgrim* v. *Beck* (ib., 895, 896, 897); *Beck* v. *Flournoy Real Estate Co.* (65 ib., 30, 35, 37); *Eells* v. *Ross* (64 ib., 417, 426); *Hitchcock* v. *United States ex rel. Bigboy* (22 Appeal Cases, D. C., 275, 284, 287, 288).

In view of the fact, of which the court will take judicial notice and which is inferentially admitted in Subdivision XVI, page 20, of the second amended bill, to the effect that only a part of the Indians on said reservations have received allotments of lands therein, and that only such Indians have ceased to occupy, in common with the others, the tracts in question, it is not necessary to inquire whether, under the doctrine announced in the recent case of *Matter of Heff* (197 U. S., 488), an Indian who accepts an allotment and patent therefor thereby terminates his tribal relations and extinguishes his right to occupy the remaining part of the reservation in common with those Indians who have not received allotments. The question here presented is whether the defendant, as Secretary of the Interior, notwithstanding allotments have been made and patents therefor issued to some of the Indians, still retains jurisdiction and control of the unallotted parts of the reservations, and the authority to prevent intrusion thereon by the State of Wisconsin or its grantees.

The defendant submits, in view of the authorities heretofore under this proposition cited and referred to, that until all the Indians entitled thereto have received allotments he has jurisdiction and control over the unallotted parts of the reservations to the same extent as he had over the whole of said reservations prior to any allotment.

DEFENDANT'S FIFTH PROPOSITION.

Even though the right of occupancy in the Indians were extinguished, so far as concerns the La Pointe Reservation, the State of Wisconsin has no such interest in any of the lands therein as entitles her to bring an action in any court.

This proposition is based upon the following allegation in Subdivision XVI, page 20, of the second amended bill:

> That patents for all of said sections 16 within said La Pointe Reservation have heretofore been issued by said State to various parties.

CONCLUSION.

Independently of any other authorities the defendant submits that his contention is sustained by the decision of this court in *United States* v. *Thomas* (151 U. S., 577), and to allow the claim of the State it is necessary to overrule the doctrine set forth therein.

In that case there was involved a section 16 within the Lac Court Orielles Reservation in the State of Wisconsin contemplated by the third paragraph of article 2 of the said treaty of 1854 (second amended bill, p. 11). The survey was made in 1855, and the

lands within the reservation selected in 1859. In 1865 the State sold the section and the purchaser denuded it of its timber. The Indians occupied the section to hunt and fish thereon before and after the cutting of the timber (151 U. S., 578). Sometime previous to 1893, one Thomas, a member of the Chippewa tribe of Indians, was indicted in the United States Circuit Court for the Western District of Wisconsin for the killing of a half-breed Indian on said section 16, the proceedings being conducted under the provisions of section 9 of the act of March 3, 1885 (23 Stats., 362, 385). A motion was made by defendant Thomas, to set aside the verdict and for a new trial, which motion was based upon the provisions of section 7 of the Wisconsin enabling act, *supra*. The defendant insisted that the section of land upon which the killing was done was "ceded to the State for school purposes, and could not, therefore, be subsequently taken by the United States and set apart as part of an Indian reservation." (*Ib.*, 578.)

The case came to this court on a certificate of division of opinion between the circuit judge and the district judge. This court held (page 586) "That the offense committed was within the limits of the reservation within the meaning of the act of Congress approved March 3, 1885, so as to give the Federal courts jurisdiction of the same," and returned the case to the court below with directions to deny the motion.

In the course of the opinion the court, through Mr. Justice Field, said, among other things, at page 582:

The Indians have never been removed from the lands thus ceded (meaning by the treaty of 1842) and no Executive order has ever been made for their removal and no change has taken place in their occupancy of the lands except as provided by the treaty of September 30, 1854 (10 Stat., 1109). By that treaty the Chippewas ceded a large portion of their territory, previously retained in Wisconsin and elsewhere, and provision was made in consideration thereof for the formation of permanent reservations for their benefit, each to embrace three full townships and their boundaries to be established under the direction of the President. One of these included the tract comprised in the La Court Orielles Reservation. In the provision for these reservations nothing was said of the sixteenth section of any townships, and it is clear that it was not contemplated that any section should be left out of any one of them. The land reserved was to be, as near as possible, in a compact form, except so far as the meandered lakes were concerned. When the townships composing these reservations were surveyed, the sixteenth section was already disposed of in the sense of the enabling act of 1846. It had been included within the limits of the reservations.

As it will be seen by the treaty of 1842, ratified in 1843, which was previous to the enabling act, the Indians stipulated for the right of occupancy to the lands. That right of occupancy gave them the enjoyment of the land until they were required to surrender it

by the President of the United States, which requirement was never made. Whatever right the State of Wisconsin acquired by the enabling act to the sixteenth section was subordinate to this right of occupancy for which the Indians stipulated and which the United States recognized. The general rule established by the Land Department in reference to the school lands in the different States is that the title to them vests in the several States in which the land is situated, subject to any prior right of occupation by the Indians or others which the Government had stipulated to recognize.

At pages 584 and 585 the court said:

We therefore are of the opinion that by virtue of the treaty of 1842, in the absence of any proof that the Chippewa Indians have surrendered their right of occupancy, the right still remains with them, and that the title and right which the State may claim ultimately n the sixteenth section of every township for the use of schools is subordinate to this right of occupancy of the Indians, which has, so far as the court is informed, never been released to any of their lands, except as it may be inferred from the provisions of the treaty of 1854. That treaty provided for permanent reservations, which included the section in question. The treaty did not operate to defeat the prior right of occupancy to that particular section, but by including it in the new reservations, made as a condition of the cession of large tracts of land in Wisconsin, continued it

in force. The State of Wisconsin, therefore, had no such control over that section or right to it as would prevent its being set apart by the United States, with the consent of the Indians, as a part of their permanent reservation. So, by authority of their original right of occupancy, as well as by the fact that the section is included within the tract set aside as a portion of the permanent reservation in consideration of the cession of lands, the title never vested in the State, except as subordinate to that right of occupation of the Indians.

It is respectfully submitted that the demurrer of the defendant should be sustained.

FRANK L. CAMPBELL,
Assistant Attorney-General.
A. C. CAMPBELL,
Special Assistant to the Attorney-General.

APPENDIX.

OPINION OF ASSISTANT ATTORNEY-GENERAL VAN DEVANTER.

DEPARTMENT OF THE INTERIOR,
Washington, November 27, 1901.

The SECRETARY OF THE INTERIOR.

SIR: Under your informal reference I have considered the letter of the 12th instant, written by the Clifford & Fox Lumber Company and J. S. Stearns Lumber Company to the Commissioner of Indian Affairs, wherein it is stated that said companies are the owners, by reason of conveyances from the State of Wisconsin, of three sections numbered 16 in the La Pointe or Bad River Indian Reservation in said State; that these sections are timbered; that there is danger of the timber being destroyed by fire, and that said companies therefore desire immediate permission to cut and remove such timber.

The State of Wisconsin was admitted into the Union May 28, 1848 (9 Stat., 233), and by section 7 of the enabling act of August 6, 1846 (9 Stat., 56), was granted, for the use of schools, sections 16 in every township, where not sold or otherwise disposed of, and where sold or otherwise disposed of, was given the right to take other lands equivalent thereto. At the time of the admission of the State, and until after the establishment of the La Pointe or Bad River Indian Reservation, the lands in question remained unsurveyed. This reservation was established under the second subdivision of article 2 of the treaty

of September 30, 1854 (10 Stat., 1109), and its boundaries were definitely fixed by the President's order of March 7, 1855. The reservation has not been extinguished. Before the negotiation of the treaty or the establishment of the reservation the lands embraced therein were claimed and held by the Indians under their original right of occupancy. By the treaty the Indians relinquished their claim of occupancy to other lands, and in consideration thereof the Government, among other things, agreed to set apart and maintain this reservation.

Whether the status of the lands embraced in sections 16 at the time of their identification by survey or their status at the time of the grant to the State is the criterion by which to determine whether they passed to the State under the school-land grant, or had been sold or otherwise disposed of and were therefore only a basis for the selection by the State of other equivalent lands as indemnity, is an interesting question, which is not free from doubt. (See *Heydenfeldt* v. *Daney Gold and Silver Mining Co.*, 93 U. S., 634; *Beecher* v. *Wetherby*, 95 U. S., 517; *State of Colorado*, 6 L. D., 412; *State of Minnesota*, 28 L. D., 374, 379.) But however that may be, the Indian right of occupancy to the sections in question existing at the time of the grant to the State has never been extinguished, and even if the view most favorable to the State be taken, it still follows from what is said in *Beecher* v. *Wetherby* and in other cases that until the extinguishment of the Indian title the State and its grantees have only the naked fee, the right of occupancy being in the Indians, and there is no power or right in the State or its grantees to interfere with or terminate this right of occupancy. That can be done only by the United States, and then only by or in pursuance of some act of Congress.

The cutting and removal of the timber from the sections in question at this time would be an unauthorized invasion of the right of occupancy of the Indians, unless done under a law of Congress. The timber upon these sections is admitted to be green and growing. The act of February 16, 1889 (25 Stat., 673), authorizes the cutting, removal, and sale of dead timber, standing or fallen, on such reservations, and there is no statute applicable to green and growing timber. This Department and the President have taken the view that article 3 of the treaty of 1854 authorizes the President to permit the cutting, removal, and sale of all the timber upon the lands in said reservation allotted in severalty to Indians under that article, but the sections here in question have not been allotted, and therefore do not come within the view so taken.

The letter of said lumber companies calls attention to that portion of article 3 of the treaty which declares that the President "may also make such changes in the boundaries of such reserved tracts or otherwise as shall be necessary to prevent interference with any vested rights." The La Pointe Reservation was, at the time of the treaty, in a very remote and unsettled part of the State, but other reservations established by the treaty were in the vicinity of or adjoining white settlements and lands held in private ownership. This may account for the use of the provision to which attention is called, but in any event its extent and purpose are not readily apprehended, and I do not understand that a change in the boundaries of the reservation, or any similar action, will accomplish the purpose of the lumber companies.

The sections 16 in question are not upon or near a boundary of the reservation, but are in the interior

thereof. Again, this reservation has stood unchallenged for over forty years, and the adjoining public lands have been so far disposed of at this time and the opportunity to get lands equivalent in character or value to the sections in question has become so restricted, that it is doubtful whether it would now be practicable to assign to the Indians any other lands in the vicinity of the reservation in lieu of sections 16, even if such a course were considered originally permissible under the treaty.

I am of opinion that further legislation by Congress is necessary to any present adjustment of the situation presented by the letter of these two companies.

Very respectfully,

WILLIS VAN DEVANTER,
Assistant Attorney-General.

Approved, November 27, 1901.

E. A. HITCHCOCK,
Secretary.

O